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No. 7735

In the United States Circuit Court of Appeals

For the Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

THE PROCTOR SHOP, INC.,
Respondent.

On Petition for Review of Decision of the United States Board of Tax Appeals

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BRIEF FOR RESPONDENT

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TABLE OF CONTENTS

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STATEMENT OF CASE

Respondent upon its organization on October 6, 1927, purchased the assets of an existing business, Proctor's, Incorporated, which had been engaged in selling women's apparel on an installment basis. Respondent took over its assets and the business continued its operations. (R. p. 11.)

Prior to the organization of respondent, conferences were held between M. H. Holtz, who became its president, his father, Aaron Holtz, and its attorney, on the question of financing the new enterprise. Aaron Holtz was willing to lend the necessary funds to the contemplated organization, but was not willing to accept its stock. He desired to be assured that his advances would be repaid, and he wanted a definite income from the funds. It was deemed inadvisable to issue bonds to cover the loan as they would affect the credit of respondent. (R. pp. 11 and 12.)

Respondent's attorney decided that it should issue "debenture preference stock" and advised Aaron Holtz accordingly. In his letter to Mr. Holtz, the attorney stated (R. p. 12):

> "The so-called 'stock certificates' will provide definitely for the payment of interest whether profits are earned or not, so that except for the fact that Aaron Holtz waives his right to share with other creditors until they have been paid, he will be entitled to a definite interest return, and the failure to pay this interest will place him in position to sue the corporation for the principal amount represented by the certificates. As a stockholder, of course, he would have no such right."

The articles of incorporation, filed with the Corporation Department of the State of Oregon, stated that the authorized capital would consist of ten shares of common stock of the par value of $100.00 and 990 shares of "debenture preference stock." The debenture preference stock subsequently issued, included the provisions of the articles of incorporation. The certificates provided that the holder was entitled to cumulative interest at the rate of 6% per annum before any dividends were paid. On dissolution it should be first paid at par, plus all accumulated unpaid interest. The corporation reserved the right to redeem it at par, plus accumulated interest after December 1, 1927, and was "bound to redeem monthly beginning December 1, 1927, debenture preference stock of the par value of $1500.00 as a minimum." The failure of the corporation to pay quarterly interest for a period of two years, rendered the corporation in default and entitled the owners of the certificates to declare the principal amount due and institute action against the corporation for the par value of the certificates and the accumulated interest thereon. (R. pp. 14, 15.)

The amounts paid on the "debenture preference stock" were claimed by respondent as a deduction. The right so to do was denied by the petitioner. On its appeal to the Board of Tax Appeals, respondent was sustained.

SUMMARY OF ARGUMENT

Payments made by respondent to the holders of its "debenture preference stock" were payments of interest.

(a) The findings of the Board of Tax Appeals can not be questioned here as the transcript does not contain the evidence upon which the Board acted.

Winnett v. Helvering, 68 Fed. (2d) 614, 615 (C. C. A. 9, 1934).

Wishon-Watson Co. v. Commissioner, 66 Fed. (2d) 52, 54 (C. C. A. 9, 1933).

(b) Error suggested in petitioner's brief, but not included in his assignments of error, will be disregarded.

Rule 11 of the Circuit Court of Appeals for the Ninth Circuit.

Week v. Helvering, 68 Fed. (2d) 693, 694 (C. C. A. 9, 1934).

(c) The interested parties intended to create a debt, evidenced by certificates appropriate to that purpose and inconsistent with a stock relationship. The certificates are those of indebtedness.

In re Culbertson's 54 Fed. (2d) 753 (C. C. A. 9, 1932).

Best v. Oklahoma Mill Co., 253 Pac. 1005 (Okla. 1927).

Wiggin Terminals, Inc., v. United States, 36 Fed. (2d) 893 (C. C. A. 1, 1929).

Arthur R. Jones Syndicate v. Commissioner, 23 Fed. (2d) 833 (C. C. A. 7, 1927).

(d) The fact that the owners of the certificates are subordinated to general creditors does not change their relation to the corporation from that of creditor to that of stockholder.

Commissioner v. O. P. P. Holding Co., 76 Fed. (2d) 11 (C. C. A. 2, 1935).
Arthur R. Jones Syndicate v. Commissioner, 23 Fed. (2d) 833 (C. C. A. 7, 1927).

(e) There is no estoppel present to prevent a determination of the true character of the certificates.

Wiggin Terminals, Inc., v. United States, 36 Fed. (2d) 893 (C. C. A. 1, 1929).
Deery's Lessee v. Cray, 5 Wall 795; 18 L. Ed. 653.
Territory of Arizona, ex rel Gaines v. Copper Queen Consolidated Mining Co., 233 U. S. 87; 58 L. Ed. 863.
Leather Manufacturer's National Bank v. Morgan, 117 U. S. 96; 29 L. Ed. 811.
The Union Mutual Life Insurance Co. v. Mowry, 96 U. S. 544; 24 L. Ed. 674.

ARGUMENT

It is now completely established that a stockholder of a corporation can not also be its creditor by virtue only of the existence of that relation. The discord and questions raised in some of the earlier decisions have been settled once and for all, but we find still the contention sometimes made that the holder of a stock certificate is entitled to the rights of a creditor of the corporation. The brief for petitioner apparently is upon the basis that respondent has urged that the holders of the certificates issued by it have the combined rights of stockholders and creditors. We do not so contend. The holders of those certificates are respondent's creditors. They have none of the rights of a stockholder. They have all the attributes of a creditor.

We believe it necessary to make the statement because of the position taken by petitioner. He assumes at the outset that the certificates issued by respondent are evidences of stock ownership, and then attempts to reconcile the provisions of those certificates with his assumption. He argues, not from the facts here found, but from the results he wished that the Board of Tax Appeals had adopted and desires this Court to reach. We perforce must consider a few fundamental principles ignored by petitioner—the attributes of a creditor relationship, and the limitations upon the rights of a stockholder, preferred or common.

It is not ordinarily a matter of any great difficulty to distinguish between a stockholder and a creditor. There are, it is true, border-line cases in which they enter the twilight zone. In the instant case, however, we are under the noonday sun.

What are the attributes of stock?

1. There is no obligation to re-pay the principal amount. The stockholder has a pro rata interest in surplus upon liquidation, but as long as the corporation continues in business no demand can be made for payment of the par value.

In the instant case the corporation is required to pay the par of the debentures at the rate of $1500.00 per month, beginning December 1, 1927.

2. Stockholders are entitled to dividends and preferred stockholders are entitled to preference in this regard, but in neither case may the corporation pay any such revenue to the stockholder out of capital. The attempt to do so may be enjoined and under the laws of some states there are penal sanctions.

Under these certificates there is a definite obligation to pay interest and there is no limitation which makes such payment contingent upon earnings.

3. Stockholders have the right to participate in corporate management. It frequently occurs that the right to vote is denied preferred stockholders under ordinary circumstances, but it is the universal practice in that regard, to accord such right to vote in the event of the failure to pay preferred stock dividends for stated periods.

In the instant case the holder of the debenture certificates under no circumstances had any voice in the corporate management. The failure to pay interest made the whole of the principal due and conferred upon him the right to institute action therefor.

What are the attributes of certificates of indebtedness?

It is unnecessary to list these because they are the converse in all respects of the attributes of stock. They involve a definite obligation, payable at a definite time. Interest does not depend upon earnings and ordinarily the certificate may be retired upon payment of the principal amount without increment, regardless of earnings. Each of these attributes was here present.

As suggested by petitioner nomenclature and labels must be disregarded, particularly so in the instant case. The certificates involved are called "debenture preference stock"—a contradiction, "Debenture" alone indicates a debt relationship, and "preference stock" that of stock. He can secure no aid from the title given to the certificates. The certificates, however, require the respondent to pay the holder interest at the rate of 6% per annum, payable quarterly, and reserve to respondent the right to redeem any number of certificates after December 1, 1927, and bound respondent "to redeem monthly beginning December 1, 1927, debenture preference stock of the par value of $1500.00." Upon the failure to pay interest for two years, the owner could accelerate the maturity of the certificates and sue the corporation for the principal amount plus interest. The holders were subrogated to general creditors of the corporation. The voting was vested exclusively in the common stock.

The intent of the parties is clearly, definitely, and uncontrovertedly shown. "Aaron Holtz was willing to lend the necessary funds to the contemplated organization, but was not willing to accept stock because he desired to be assured that his advances would be repaid and he also wanted a definite income from the funds." (R. p. 11.)

"It was obviously the intent of the interested parties that the $99,000.00 advanced * * * was to be regarded as a loan." (R. p. 19.) These facts are undisputed and so found by the Board of Tax Appeals.

The certificates evidencing the contractual rights of respondent with their holders are consistent only with this purpose of the interested parties. Disregard the labels, pass over the terms "debenture preference stock," "interest", "par value", "redeem", but notice in passing that the use of the word "redeem" is consistent with the creation of a debt, it meaning "to remove the obligation of, as a note, but paying what is due * * * to fulfill, as a promise" (Webster's Collegiate Dictionary, 4th Edition)—and the primary purpose, to create a debt, clearly remains.

How can the provision requiring the payment of 6% interest quarterly be otherwise explained? How can the obligation of respondent to pay $1500.00 monthly on the certificates outstanding, *beginning seven weeks after its organization,* be reconciled with the stock relationship which is characterized by a permanent contribution of funds to the corporate enterprise. Again the provision for the acceleration of the maturity of the instrument identifies it as one of indebtedness and not of stock. If there be read into the certificates the provision that interest should be payable only out of the profits of the corporation, the acceleration clause would be only a jumble of words. If profits were made, interest would be paid. It is only when the parties contemplate the failure of the corporation to make money that the acceleration clause has meaning. It is only when parties realize and intend that interest must be paid, regardless of the existence of a profit that an acceleration clause is included in a contract. The holders of the certificates are given no rights inconsistent with a debtor-creditor relationship. The provisions in the certificates can not be reconciled with the creation of a stock relationship.

The fact that the certificate holders are subordinated to the general creditors of the Company does not require any other conclusion. Varying degrees of superiority among creditors are common. There are secured creditors, first, second, or even lower, and general creditors. And those inferior to the others are not forced against their will into the position of a stockholder. *Commissioner v. O. P. P. Holding Co.,* 76 Fed. (2d) 11.

The fact that the money was desired to finance the corporate enterprises does not convert the instruments into certificates of stock. Bondholders advance money for the same purpose and for periods much longer than the five and one-half year period in which respondent bound itself to pay the obligations evidenced by the certificates. Seven weeks after the corporation was organized, it was obligated to pay at least $1500.00 a month upon the obligations. We know of no instance, petitioner neither here nor before the Board of Tax Appeals, has referred us to one where a corporation undertook the redemption of its preferred stock less than two months after its issuance.

We need comment upon only a few of the authorities cited by petitioner. We agree that labels are not conclusive. Each case of this type must be determined upon its own facts, only the controlling principles may be gleaned from the decisions. This Court has been called upon before to decide whether certificates are those of indebtedness or of stock. The problem was presented in *Armstrong v. Union Trust & Savings Bank*, 248 Fed. 268. It there appeared that in 1907 the corporation had authorized the issuance of preferred certificates of indebtedness which contained a clause that the holders were not stockholders, but creditors. In 1909 an issue of preferred stock was authorized. The certificates then provided for interest at the rate of 7% per annum and for the retirement of the stock. This Court held that the holders of the certificates of 1909 were stockholders and not creditors, saying:

> "The company appreciated very well the difference between certificates of indebtedness and preferred stock, as it, by its board of directors, provided for the creation of each kind of liability."

If the corporation had intended to create a debt, the provisions contained in the certificates issued only two years before—that the holders were creditors and not stockholders—would clearly have been included. In the *Armstrong* case, the corporation intended to issue stock, and that intent was respected and adopted by the Court. In the instant one respondent and the interested parties intended to create an indebtedness to be evidenced by the certificates.

Next, is *Elko Lamoille Power Co. v. Commissioner,* 50 Fed. (2d) 595. The certificates there considered, provided for 7% cumulative dividends on the preferred stock, and for their redemption at 110 after three years. The stock had been sold by individuals upon their representations that the holders could surrender it at any time for the amount paid, plus accrued dividends. This Court held that the oral representations amounted only to collateral agreements between the purchasers of the stock and the officers of the corporation. The certificates were held to be stock certificates, the deciding factor being that the stock was redeemable at the option of the company. This is emphasized by the language used in distinguishing *Arthur R. Jones Syndicate v. Commissioner,* infra. In so doing, the Court said:

> "In the instant case the preferred stock could, *at the option of the corporation,* be redeemed within three years at 110. There was, however, no obligation to redeem. In the Jones Syndicate there was an express provision to pay at five years. It was in effect a bond payable in five years."

The *Elko Lamoille* decision is distinguished by the very language above quoted. As in the *Arthur R. Jones*

Syndicate case, the certificates here contain an obligatory provision for redemption, absolute and unconditioned.

Then there is the decision in *In Re Culbertson's,* 54 Fed. (2d) 753, where the corporation issued "preferred stock", providing for semi-annual dividends, and some of which stated that it would be redeemed on a date specified. This provision for redemption was urged to evidence the intent that the certificates were those of indebtedness. This the Court rejected, saying:

> "It is apparent that it was the intention of the parties that these certificates should evidence the right of the holders thereof to participate in the earnings of the corporation as holders of preferred stock entitled, by reason thereof, to receipt of the agreed proportion of the net earnings they were to receive before holders of common stock were entitled to share in such earnings."

Finding that it was the intent of the parties that the certificates should evidence ownership of stock and not of an indebtedness, and respecting that intent, the Court considered the other features incorporated in the certificates, and found all of them consistent with the stockholder relationship when interpreted in the light of the statutes and law of the State of Washington, the State of incorporation.

The intent of the interested parties is regarded as a material, if not the controlling element. This view is found also in the decisions of the Circuit Court of Appeals for the 7th Circuit, in *Arthur R. Jones Syndicate v. Commissioner,* infra, and of the Circuit Court of Appeals for the 1st Circuit, in *Wiggin Terminals, Inc. v. United States,* infra.

The major difference between *In Re Culbertson's* and the instant case is the factor of intent. Preferred stock was intended in the *Culbertson* case, an indebtedness in the instant one. (R. pp. 11, 12, 19.)

The decisions noted seem to be the principal ones relied upon by petitioner. Singly or together the principles they establish, applied to the facts here involved, do not warrant the conclusion that the certificates issued by respondent are stock certificates. They support the contrary holding.

A few other decisions should also be considered.

In *Arthur R. Jones Syndicate v. Commissioner,* 23 Fed. (2d) 833, the Syndicate was organized to promote a real estate venture. $600,000.00 was needed to redeem the property from foreclosure sale. Preferred stock was sold, but sufficient funds were not realized therefrom. A loan was then sought. A prospective lender demanded interest at the rate of 14%. The loan was not negotiated, the interest rate being usurious. To avoid the usury law, the Syndicate's capital structure was revamped to provide for an additional class of preferred stock. The shares were to be redeemed July 1, 1922, "by payment of the par value thereof plus a dividend at the rate of

14% per annum * * *." In the event of the redemption, sale or other disposition of the property, the proceeds were to be applied, first, to the payment of the debts and obligations of the syndicate, and then to the payment of the first preferred shares. On failure to redeem this stock, the voting power and control was vested in its holders. Said the Court:

> "Aside from the form of the instrument which the parties adopted to embody their contracts, there is no evidence to contradict the asserted relationship of debtor and creditor. Not only does all the oral testimony confirm this conclusion, but the payments and other written evidence strongly confirm the words of the witnesses."

Taxpayer was permitted to show the true nature of the transaction. Note that in this case, the certificates were called first preferred shares. They provided for the payment of a dividend, for their redemption at par, and all the terminology was that of a stock certificate. Of prime importance is the additional stipulation in the articles of the Syndicate that the holders of the first preferred shares were inferior on redemption, sale or other disposition of the property to the general creditors of the corporation.

The *Jones Syndicate* decision was followed by the Circuit Court of Appeals for the 1st Circuit in *Wiggin Terminals, Inc. v. United States,* 36 Fed. (2d) 893, the Court saying:

> "The payment of interest in the form of dividends does not change its character when it is

shown that the reason for its taking that form was to avoid a usurious contract, or for some reason personal to the parties concerned. Arthur R. Jones Syn. v. Commissioner, supra.

"If it be shown that dividends paid are, according to the intent of the parties, in fact interest, and the stock on which the dividends are paid is merely held by the creditor as security, it makes no difference what the reason was for paying in that form. The courts look to the real character of the payment, and construe the statute liberally in favor of the taxpayer. Gould v. Gould, 245 U. S. 151, 38 S. Ct. 53, 62 L. Ed. 211."

An analogous case is that of *Best v. Oklahoma Mill Co.,* 253 Pac. 1005, a decision of the Supreme Court of Oklahoma. Action was brought to recover the principal amount plus interest on four "certificates of preferred stock." The certificates provided that the corporation would not create any mortgage without the written consent of its holders. A mortgage was executed without plaintiff's consent. The mortgagee contended that its rights were superior to those of plaintiff. Judgment was entered for defendants, plaintiff having elected to stand upon his petition after demurrers to it were sustained. The certificates provided:

" 'This certificate of preferred stock matures on February 1, 1925, and will be redeemed or retired by the Oklahoma Mill Company on that date by the full payment of the par value thereof, together with any cumulative dividends'."

After recounting certain general principles, the Court said:

"The third provision of the certificate, supra, is an absolute and unconditional promise of the corporation to redeem the stock of plaintiff on its due date or maturity to the extent of the par value and cumulative dividends, if there be any. It seems as absolute and binding as the obligation of a decidendi herein. This provision is inconsistent with, and obnoxious to, the theory that plaintiff is a preferred stockholder, for that a preferred stockholder, though having a preference over a common stockholder in distribution of assets, when he invests his money in the corporate stock of the company, takes the hazard of its success."

* * * * * *

"It thus appears that, while said certificate contains numerous provisions appropriate to preferred stock, none of these, construing the whole instrument together, are conclusive that the plaintiff purchased an interest in the company represented by said instrument, taking the hazard of never getting his money back. E converso, such provisions do not destroy, restrict, or condition the absolute promise to pay plaintiff found in the third paragraph. They do not show that the plaintiff is not a creditor."

Defendant there, as does petitioner here, relied upon *Spencer v. Smith,* 201 Fed. 647. The Oklahoma Court distinguished that decision, saying:

"One important distinction between that case and the one at bar is that the preferred stockholder went to the length of fixing his status as such by said recognition in the mortgage. It is not difficult thus to understand the statement in the opinion that there was no provision in the certificate of preferred stock which, if properly construed, is not appropriate to such certificate. A study of the syllabus above quoted discloses that the express agreement to re-

> deem the stock is not the rationale of that decision. This is further borne out by the opinion in stating that the provisions for the payment of $11 per share to the preferred stockholders on dissolution of the assets 'was all the parties to the certificate intended.' The holding in that case that the claimant was a preferred stockholder is predicated upon the peculiar facts thereof, important among which is the acknowledgment of the certificate holder in the mortgage that he was simply a preferred stockholder. If plaintiff in the instant case had consented to a mortgage, fixing his status as a preferred stockholder, that case might be authority that the absolute agreement to pay, found in paragraph 3, would not constitute him a creditor."

Judgment was reversed and the cause remanded.

The assumption of the unconditioned obligation to pay the amount of the certificates, regardless of the existence of profits or earnings is a feature which can not be reconciled with the stockholder relationship. In the *Best* case, in the *Arthur R. Jones Syndicate* decision and in the instant case, it was the intent of the parties to create an indebtedness. In *Armstrong v. Bank,* and in *In re Culbertson's* there was the intent that stock be created.

In *Kentucky River Coal Corporation v. Lucas, Commissioner,* 51 Fed. (2d) 586 (D. C., W. D., Kentucky, 1931) there was also the purpose that certificates of preferred stock and not of indebtedness be issued. The corporation there involved provided for the issuance of debentures to be held as treasury stock for disposition by the corporation and to use the proceeds to discharge the indebtedness of five corporations whose property was acquired. The intent that the certificates be those of stock is emphasized by the determination to hold the debentures as treasury stock, by the fact that in its income tax returns the corporation reported the amounts received from the sale of the debentures as invested capital, and so treated it in determining the taxes. The returns were made to the United States Government. There were no provisions in the certificates inconsistent with a stockholder relationship.

So also in *In re Fechheimer-Fishel Co.*, 212 Fed. 357 (C. C. A. 2, 1914), the certificates there considered contained provisions characteristic of stock and not of bonds, nor was there present the obligation of the company to pay them.

Again in *Smith v. Southern Foundry Co.*, 179 S. W. 205 (C. A., Kentucky, 1915), the charter fixed the company's capital at $40,000.00, of which $15,000.00 was represented by preferred stock. The intent to issue stock was found in the fact that if the preferred stock be considered a debt, the debt limitation provision would be meaningless, and the provision for 7% dividends would be usurious and in conflict with the statutes.

In *Fidelity Savings & Loan Ass'n v. Burnet*, 65 Fed. (2d) 477 (C. A., D. C., 1933), taxpayer, a building and loan association, sought to deduct as part of its expenses sums paid to its stockholders on its passbook stock, and its full paid capital stock. The Court recognized that the problem of determining whether the holders of the stock were creditors or stockholders was complicated by the fact that taxpayer was a building and loan association. The Court said:

> "In the view we take of this case, there is, we think neither in the certificates of stock, nor in the by-laws, nor in the local law, anything which would justify us in saying that a member of the association holding these shares was, during any of the time involved in this dispute, in the position of creditor of the association. He received his agreed share of the earnings, and, if misfortune overtook the association, his investment was subject to the payment of its debts. He could participate in the management of the corporate affairs. He had, it is true, the advantages of withdrawal which the holder of permanent stock did not have, but this advantage accrued only during the solvency of the corporation. He did not withdraw, and, had the company become insolvent, he could neither have set off the amount of his subscriptions against his indebtedness to the company nor could he have shared in the assets on an equality with creditors."

The money paid on the certificates was not interest. The stockholders of the savings and loan association were given the right to participate in its management, a feature not accorded creditors. The holders of the certificates issued by respondent were not accorded that privilege. Furthermore, the Court itself recognizes that savings and loan associations are unique and governed by principles not applicable to the usual business corporation as is respondent.

Petitioner has not referred to a single decision involving certificates similar to those issued by respondent which would support a holding that these certificates are those of stock, but petitioner seeks to avoid a decision on the merits of this case by invoking the doctrine of estoppel. His chief support is *People v. Miller,* 180 N. Y. 16; 72 N. E. 525. The only question there involved was stated by the New York Court as follows:

> "The legal question is presented whether the laws of the State of New York permit the organization of a corporation in a manner calculated to mislead the general public as to the amount of its capital stock and its total indebtedness."

The Court refused to decide whether the holders of the certificates were stockholders or creditors, saying:

> "We do not feel inclined to decide this question in litigation to which none of the holders of preferred stock is a party, or in a condition to assert his rights. We do hold, however, that the question of the construction of the instrument being clearly a debatable one, the relator should, in the face of the declaration in the articles of association that the money represented by these certificates constitutes a part of the capital stock of the corporation, be estopped from asserting to the contrary in a proceeding to determine their liability to the franchise tax."

Note that the representation made by the corporation in that case was directed to the State of New York which sought to enforce the payment of the franchise tax. Note that the State of New York accorded the corporation the right to do business in that State upon those representations. Such is the ordinary case of estoppel, the representation made to a party to act thereon. The party acts to his prejudice, and accordingly the representation can not be denied. These elemental principles of the law of estoppel have been recognized time and time again.

In *Bigelow on Estoppel,* 6th Edition, page 617:

> "*Only parties* and *their privies* are bound by the representation and only those whom the representation is made to or intended to influence and their privies may take advantage of the estoppel. However the act was *inter alios,* there can be no estoppel."

In *Deery's Lessee v. Cray,* 18 L. Ed. 653, 5 Wall. 795, the Court, speaking through Mr. Justice Miller, and dealing with the question of Estoppel, asked whether or not a certain course of conduct could be asserted to have estopped William Brent from claiming as heir to his father, answered its own question as follows:

> "*Clearly not, for the simple reason that no person can rely upon estoppel growing out of a transaction to which he was not a party nor a privy, and which in no manner touches his rights. There is no mutuality, which is a requisite of all estoppels.* That is precisely the case before us. The plaintiff claims under Brent and his deed. Defendants claim nothing under that deed, and deny all connection with the title it purports to give. They are strangers to it, and have no right to set up its recitals as estoppels." (Emphasis ours.)

And in *Territory of Arizona ex rel Gaines v. Copper Queen Consolidated Mining Co.,* 58 L. Ed. 863, the Court answered the contention that by paying an assessment the party making the payment was estopped to deny its validity, as follows:

> "In such a proceeding it is difficult to see how the principles of estoppel because of the description of the land made by the owner in returning the property or the payment of taxes, as appears from the finding in this case, could have application. *Estoppel ordinarily proceeds upon principles which prevent one from denying the truth of statements upon which others have acted, where the denial would have the effect to mislead them to their prejudice."* (Emphasis ours.)

In *Leather Manufacturer's National Bank v. Morgan,* 29 L. Ed. 811, Mr. Justice Harlan said:

> "The doctrine of estoppel by conduct has been applied under a great diversity of circumstances. In the consideration of the question before us aid will be derived from an examination of some of the cases in which it has been defined and applied. In *Morgan vs. R. R. Co.,* 96 U. S. 720 (Bk. 24, L. ed. 744), it was held that a party may not deny a state of things which by his culpable silence or misrepresentations he has led another to believe exisited, *if the latter has acted upon that belief.*
>
> * * * * * *
>
> "These cases are referred to for the purpose of showing some of the circumstances under which the courts, to promote the ends of justice, have sustained the general principle that where a duty is cast upon a person, by the usages of business or

otherwise, to disclose the truth (which he has the means, by ordinary diligence, of ascertaining) and he neglects or omits to discharge that duty, whereby another is mislead *in the very transaction to which the duty related,* he will not be permitted, to the injury of the one misled, to question the construction rationally placed by the latter upon his conduct." (Emphasis ours.)

Then again, in *The Union Mutual Life Ins. Co. v. Mowry,* 24 L. ed. 674, the Court said:

> "The doctrine of estoppel is applied with respect to representations of a party, to prevent their operating as a *fraud upon one who has been led to rely upon them.* They would have that effect, if a party who, by his statements as to matters of fact, or as to his intended abandonment of existing rights, *had designedly induced another to change his conduct* or alter his condition in reliance upon them, could be permitted to deny the truth of his statements, or enforce his rights against his declared intention of abandonment." (Emphasis ours.)

We are at a loss to understand how petitioner can urge an estoppel because respondent paid a larger license fee to the State of Oregon than it should have paid, on the theory that the certificates do not represent stock. Even the State of Oregon could not invoke the doctrine of estoppel because it was benefited, not damaged. Respondent paid more, not less than it should have paid. Petitioner was not a party to the transaction; he was not misled thereby; he did not act thereon; he did not change his position to his hurt. In fact he is a total stranger. Estoppel is not applicable to this decision, nor to bar a showing of the true nature of these certificates.

A consideration of all the factors, the intent of the interested parties, the language of the certificates, the purpose and the plans, when meaning and effect are given to them in their entirety, require the conclusion that the certificates represent an indebtedness and not stock ownership. Payments made thereon are payments of interest which respondent was entitled to deduct.

One other point should be noted. It is suggested by petitioner, on page 4 of his brief, that the findings of fact made by the Board were based upon improper testimony. The transcript of the record in this cause, does not include the evidence submitted to the Board. The findings made can not now be attacked, they are conclusive.

> *Winnett v. Helvering*, 68 Fed. (2d) 614, 615 (C. C. A. 9, 1934).
> *Wishon-Watson Co. v. Commissioner*, 66 Fed. (2d) 52, 54.

Nor do petitioner's assignments of error challenge the action of the Board in admitting into evidence improper testimony. Error suggested in the briefs, but not raised in the assignments of error, will not be considered.

> Rule 11 of this Court.
> *Week v. Helvering*, 68 Fed. (2d) 693.

CONCLUSION

There is only one feeble contention to sustain petitioner's position, and that is that the instrument is called "debenture stock". Conceding for the argument that that is a persuasive factor, the findings of fact, the intent of the parties, conclusively negative the asserted inference from the bare nomenclature.

As a matter of fact, of course, the title "Debenture Stock" is a contradiction in terms and makes the instrument ambiguous on its face and contradictory. A resort to the instrument itself and to evidence *aliunde* is therefore necessary.

The priority provisions are not inconsistent with the rights of the holder as a stockholder, nor with his status as a creditor, but the right of the holder to interest regardless of earnings and to sue the corporation for the amount of the "stock" and interest in case of default in payment of interest, is irreconcilable with any "stock" theory.

We assert with confidence that no Court has ever held to be stock an instrument under the terms of which there is: (a) An express unconditional obligation to pay interest. (b) An express unconditional obligation to pay principal. (c) Absence of voting power, choice in management, share in surplus, or earnings, either before or at the time of dissolution.

Respectfully submitted,

DEY, HAMPSON & NELSON,
ROSCOE C. NELSON.